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Supreme Court U.S.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

JAMES T. WALKER
Petitioner,

v.

THE INSTITUTE FOR ECONOMETRIC RESEARCH.

On Petition for Writ of Certiorari
To The Court of Appeals for the
Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

JAMES T. WALKER
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24 pp

QUESTIONS PRESENTED

1. Whether or not a variety of prejudices - though perfectly understandable ones - have played a role in the outcome of this case. Put a small group of them in a busy court and the result can be a severe impairment of justice. This could happen more frequently than one might suspect, especially in low-level cases like the one before you. Did it happen here?

2. All prejudices cannot be outlawed, but could not precautionary due process measures be taken to insure that ordinary prejudices should not interfere with even-handed justice?

LIST OF INTERESTED PARTIES

1. James T. Walker

2. The Institute for Econometric Research

TABLE OF CONTENTS

Questions Presented	i
List of Interested Parties	ii
Table of Contents	iii
Table of Citations	iv
Statement of Jurisdiction	1
Statement of the Case	2
Argument	3
Appendix	18

TABLE OF CITATIONS

Local Rule 7.5 9

Evans v. American Nurses Ass'n,
637 F.Supp. 1297 (W.D. Mo. 1987) 13

STATEMENT OF JURISDICTION

The order sought to be reviewed is a final order of judgment issue by the Eleventh Circuit Court of Appeals on October 31, 1997.

Petitioner's Motion for Rehearing before the Eleventh Circuit was denied by order of that Court on January 30, 1998.

This Writ is filed under the jurisdiction conferred to the Court under Article III of the United States Constitution, 28 U.S.C. § 1254.

STATEMENT OF THE CASE

Petitioner, Plaintiff below, filed an action against his former employer, The Institute for Econometric Research. ("The Institute"). The action arose from the Plaintiff's termination from employment at The Institute and was brought pursuant to the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621-634. Essentially, the claim focuses on the issue of whether Petitioner's release from employment was based solely on his age or was due solely to poor performance.

The District Court granted The Institute's motion for summary judgment. The Petitioner appealed to the Eleventh Circuit Court of Appeals and that Court affirmed the decision of the District Court. Petitioner filed a Motion for Rehearing before the Eleventh Circuit, but said motion was denied. Petitioner now files this Petition for Writ of Certiorari.

ARGUMENT

I. THE FACTS - Undisputed and indisputable. The Plaintiff was dismissed before work on the morning of June 17, 1992, on the basis of defendant's special report, printed the afternoon of June 16, 1992, showing poor performance by the plaintiff.

II. THE ISSUES - Undisputed and indisputable. It is simply whether the plaintiff's dismissal was based solely on his age, as plaintiff alleges; or based solely on plaintiff's poor sales performance, as defendant claims.

III. THE EVIDENCE - No new exhibits. A few old ones offering new and surprising insights. Exhibits include:

Defendant's personnel records indicating that, in the department where plaintiff was employed, average age for male employees was 26, as opposed to plaintiff's age (at that time) of 75. Exhibits B-1, B-2;

Two KEY exhibits that conflict: defendant's account of plaintiff's sales performance, (Exhibit C) and plaintiff's own record, (Exhibit D. Please note:—

plaintiff apologizes for a petition made bulky by including all 20 pages of this exhibit. Unfortunately, all previous excerpts or condensations were apparently overlooked.) Both C and D cover roughly the same time frame, but in other respects there is a marked difference. It becomes self-evident that only one of these records is valid. The importance of both, on which each party bases its main argument, also seems self-evident.

IV. CONTRAST BETWEEN THE TWO KEY EXHIBITS - Arguments not presented prior to the Summary Judgment ruling of the District Court, (September 1996).

1. Petitioner's Exhibit C is a 2-page computer printout called a Transaction Report. Produced at 2:58 p.m. on June 16, 1992; Plaintiff's Exhibit D is a handwritten day-by-day account of 20 pages, approx 5" x 8" (original available).

2. Exhibit C is based on input from one individual, the newly promoted sales director (formerly sales supervisor). Exhibit D gives the names of 104 individuals, scattered throughout the country. Phone numbers are frequent, as well as personal date useful for follow-up. (It was never intended as a scorecard.)

3. Exhibit C is a compilation of statistical data. It concludes showing an average sales figure for the plaintiff of minus $2.44 per hour. Exhibit D, based on specific sales, shows improving performance, exceeding $50.00 an hour Monday, June 15, 1992.

V. CREDIBILITY TEST, EXHIBIT C - For the first time this exhibit is shown in conjunction with relevant other exhibits to make significant points previously unrecognized. Please note: In all previous Motions, plaintiff naively assumed that a fair comparison of C and D would necessarily bestow credibility on D. Yet, time after time, the courts failed to agree with such a presumption. Therefore, this last opportunity to bring forth the truth merits a far more thorough scrutiny of C. Its importance is high-lighted by comments from the District Court's Summary Judgment, Petitioner's Exhibit A-1:

1. A grouping of factors relating to productivity.

a) <u>The minus $2.44</u>. "The Institute calculated productivity by subtracting $60.00 from the sales price of orders." (A-1 pg. 15)

b) <u>Quotas</u>. "The Institute required a minimum of $60.00 to $75.00 an hour." (A-1 pg. 15)

c) Never attained. "The Institute contends that Walker did not once reach the expected productivity and ...

d) No promise of improvement ... showed no promise of improvement". (A-1 pg. 15)

e) Testimony of Winfield, sales director (former supervisor). "Although Walker testified that the expected productivity was $50.00 an hour, based on his own calculations, he met that quota only once, two days before he was terminated." (Walker dep. 145). Winfield testified, however, that reaching the quota once during the probations period would not satisfy the Institute's productivity requirements. (Winfield dep. 11).

f) Significance of Winfield's Testimony. On the subject of quotas, it appears to be conceded that plaintiff did attain the desired quota, even if only once. There are also indications that the quota was $50.00, not $60.00 - $75.00. And there is not the slightest trace or hint of any subtractions or penalties. Also it is a matter of record that there is no mention of these negative factors in the 220 page sales manual, nor any place else in the defendant's sales literature.

g) Sales contests for improvement, and the double standard. Further, no sign of any $60.00 "adjustment" is evident in a sales contests Memorandum from Winfield on his first day as sales director, June 1, 1992. (Exhibit E) It is absent in such phrases as "average per sale" and "average dollar amount per sale". Yet there was a reliance on this factor as a cause for dismissal two and one half weeks later. Apparently, there was a double standard: one for his department, where the $60.00 factor is ignored; and one for a document for the special purpose of dismissal. (Incidental note: there was a general yardstick used to measure sales productivity. It was used in the sales manual and in all literature pertaining to sales and it also came to be used by Ms. Ciba and her successor. It was simple. Add up the sales regardless of type, and divide by number of hours worked.)

h) That harsh rules, steep quotas, intimidating threats and penalties should abound in the sales department, as portrayed by defendant, seems quite unrealistic. Telemarketing jobs were easy to get. (See Exhibit F) No normal human would put up with the unpleasant hassle which appears to be the policy claimed by defendant, to suit its purpose in this action.

2a) A new overview of a rushed dismissal.

June 1	Monday	Improvement contests announced Ex E
June 12	Friday	Plaintiff's best-yet sales of $46.00 an hour Ex D
June 15	Monday	Plaintiff's best-yet sales of $51.00 an hour Ex D
June 16	Tuesday	2:58 p.m. Defendant's Transaction Report Ex C
June 17	Wednesday	Plaintiff dismissed before work
June 21	Sunday	End of contest for most improvement Ex E

2b) A tale is in the timing.

1. The clear object of the director's contests was improvement.

2. Though off to a slow start (a handicap which was overcome) plaintiff's rate of improvement was exceeding the $10.00 an hour needed to qualify for the first contest. Thus the desired improvement was on record.

3. Yet, less than 24 hours following plaintiff's best day, the director was motivated to produce an unscheduled Transaction Report unfavorable to the plaintiff.

4. Less than 24 hours later he used it as grounds for dismissal.

5. Dismissal took place less than a week before the sales contest ended.

Note: aside from a defense counsel challenge, described below, all of the above facts pertaining to the abruptness of plaintiff's dismissal are undisputed and indisputable. See Local Rule 7.5, "... all material facts set forth in the statement required to be served by the moving party will be deemed admitted unless controverted by the opposing party's statement."

VI. CREDIBILITY TEST, PLAINTIFF'S EXHIBIT D - first noted June 1997.

1. Exhibit D challenged. The challenge came from the defense counsel on the occasion of his deposition of the plaintiff. Plaintiff happened to remark that his dismissal came just two days before attaining sales averaging $50.00 an hour. Defense counsel asked for proof. Accordingly, plaintiff original records were placed on the table while

counsel, keeping track on a yellow pad, together with the plaintiff toted up the sales for June 15. In a few minutes counsel proved, beyond all doubt, that plaintiff sales came to $51.65 an hour. Witnesses at the table included the defendant's president as well as its sales director.

2. It cannot get any more vulnerable than this. With its abundance of specific detail - names, phone numbers, transactions - Exhibit D "lets it all hang out". And it has done so since Day One. Any investigator, any reader of this document, is and always has been free to find even the slightest evidence of deliberate misrepresentation. Nothing has ever been added, subtracted or altered. Except for the skepticism of defense counsel, no one has ever disputed a word.

VII. SHOCKING INDIFFERENCE OF FEDERAL COURTS. PROOF POSITIVE.

With the proof squarely confronting them, showing one party telling the truth and the other twisting it, both Courts refused to see it. They looked the other way. And these are FEDERAL COURTS OF JUSTICE. Appalling and disgraceful.

To record here the massive evidence attesting to the indifference of both Courts would require several pages. Following are a few examples,

beginning with what appears to be a minor issue concerning telephone procedures such as establishing rapport. Three points will be made clear:

> defendant's distortion of simple facts;
> the Courts' readiness to accept the distortion and use it against plaintiff;
> the Courts' disregard of plaintiff's refuting the distortion.

1. Telephone procedures. Rapport. "Both Ciba and Winfield testified that they advised Walker that establishing rapport with the caller contravened the Institute's policies." (A-1 pgs. 16, 17). Criticism along these same lines also appears in A-2 pg. 4 or 6). For an example of plaintiff's efforts to refute the false allegation, which defendant has made often, please refer to Exhibits G-1, G-2 and G-3. They show repeated conspicuous use of defendant o w n materials. In vain.

2. Boosting and cross-selling. "Walker did not attempt to boost sales or to cross-sell". (A-1 pg. 16). Plaintiff's Exhibit D, not too carefully written and clearly not planned for its present usage, shows on most pages certain letters which represent the various publications. (ID - Investors Digest, etc.) After discussion with the caller, it would be agreed between caller and plaintiff that certain newsletters, of which the called had been unaware, could be of value. Arrangement was then made to send sample

copies. Such are examples of boosting and cross-selling, quite diligently pursued by plaintiff.

3. Statistical Evidence. "Walker testified that the Institute did not discriminate in its hiring process (Walker dep. 42, 163) ... and that he was unaware of discrimination against others". (Walker dep. 163). (A-1 pgs. 9, 10). Also: "Walker has failed to place his statistics in proper context". (A-1 pg. 9)
Concerning the above two excerpts, there is the defendant's plausible way of presenting its policies (clearly endorsed by the Court, bolstering its position with numerous citations); and there is the plaintiff's plausible way of presenting his side. At age 75, plaintiff was hired to join defendant's training program. But this argument, though compelling, should not end there. Plaintiff was hired by the founder and leader of a certain department that had its own rules. There is no other way to explain Exhibit B-1, in which defendant lists the names of every employee, also showing age and where employed. It is undisputedly true, as is Exhibit B-2. Thus, plaintiff, entering the department on his first day of employment, (and encountering the head supervisor for the first time) looked around and noted only one man whose hair was similar in color to his. And he was pushing a mail cart. Plaintiff's statement is in proper context. Fact: he exceeded the average age of all other males by 49 years. How could the District Court walk around a statistic like that? Citing numerous laws does not do it. Some

laws are used to implement justice, and others can be found to obstruct it.

VIII. CLOSING ARGUMENTS

Proving age discrimination. Defense counsel had to survive a rather humbling experience when, during deposition, his challenge of the plaintiff's sales served only to weaken his client's position and confirm the plaintiff's. Yet the plaintiff too had some awkward moments during that five and one half hour session. He alleged that, in the supervisor's first glance there was instant hostility and that subsequent events during the morning more than confirmed this impression. But how to describe a look, a tone of voice, what was said or left unsaid, done or not done? The more the plaintiff strove to be accurate and honest the more ludicrous he appeared. The plaintiff has had a fairly successful career in selling and as sales manager, but he is not Lawrence Olivier. Fortunately, the law takes into account that proving age discrimination poses exceptional problems. Evans v. American Nurses Ass'n, 637 F.Supp. 1297 (W.D. Mo. 1987). Extra consideration is given evidence that of necessity must be circumstantial. Herewith are examples:

1. There are positive clues in the District Court's Summary Judgment ruling which has been so heavily relied on by defendant, and apparently

accepted as valid by the Court of Appeals. Yet in all the lengthy arguments presented by the Court, ignored or slighted in the Ruling are such vital items as

- plaintiff's key Exhibit D. Not a word;
- the new director's sales contests, with their lack of any reference at all to the highly publicized $60.00 penalty. No, not a word;
- nothing about the strange timing of defendant's Exhibit C, though its minus $2.44 proved the basis for the claim of poor performance and for a rushed, next-day dismissal;
- nor anything at all about defendant's numerous allegations repeatedly being proved spurious, often by the use of defendant's own self-incriminating material.

All in all an inept, callous performance by a Federal Court that had forgotten about its noble mission to administer justice.

1a) Yet, a word on its behalf. When the ruling was made the Court, due to an unscrupulous defense, was confronted with many different issues, all weighted equally. The two key exhibits, mistakenly taken for granted by the plaintiff, actually were given less attention than minor ones. Issues such as procedures served to distract. Defense motions leading to the time of the ruling, and the defense motion for the ruling, were bulky, to say the least.

Outrageous lies, forgeries, the provable suborning of a witness all successfully served to obscure the truth. Further, the Court happened to be without a senior judge, happened to have a heavy caseload, and happened to be plagued by pro se scoundrels exploiting the system. (One no gooder had recently filed more than 70 lawsuits.) The Court indeed had its problems. And none favored the plaintiff.

2. Should a question about motive be considered irrelevant? Were the plaintiff before a jury he might personally suggest the simplest of options: let it decide that the plaintiff is either senile, dreaming of events that never happened, OR that he has devised a scheme to make money from an employer. But then, how to explain the letters protesting his dismissal? Plaintiff submits that there is no other choice. Except this: that he is honest in alleging that cause of dismissal was age, not performance, and that he is honest in every aspect of his supporting evidence.

REASONS FOR GRANTING PETITION

Nerve is required to bring before this highest of Courts one of the dullest of cases. And dull is only one of several negatives. All, as a certain grandson might say, are "turnoffs". They leave people disinterested or viewing with distaste. Thus, for the past several years, plaintiff's motions and rebuttals, arguments and evidence, have largely been ignored; while a clever defense strategy - loading on numerous issues to obscure the truth of the main one - along with blatant distortion of facts, has been winning all the points. Early on, the accepted and usual course of judicial proceedings was abandoned. There has been no fair evaluation of the position of both parties. No such thing as even-handed justice. Plaintiff's last hope of finding it is here. He can only ask: Please. Do not be turned off too quickly.

An ordinary age discrimination case - and plaintiff's is very ordinary - does not rivet the attention. Goes to the bottom of the heap in interest and concern. To the above, add an ignoble pay of $6.00 an hour. And then there is the job itself: telemarketing! A national plague. And there is more. Low pay and the limitations imposed by law make for a non-lucrative situation for attorneys. None in plaintiff's area could be found to help. Thus he was forced to act pro se - an error prone breed not highly regarded by any court struggling with a caseload.

The matter of significance. There is no issue to be decided here. Only a situation that needs correcting. An ordinary person who had been wronged is being wronged again by the nation's Courts. What happened to the plaintiff surely may happen to others. Thus the present situation would seem to merit investigation and correction. And even if there were only one person out there who has been mistreated, the ideal of "justice for all" seems too noble to be abandoned.

A parting hope. No, a dream. Perhaps this final and oft-repeated appeal to consider the evidence will again fail. Unwilling to confront such a thought, plaintiff seeks solace in a dream about what this Petition and long-fought case might somehow accomplish:

> Could it perhaps send a message to the over-vigilant Senator Hatch? As chairman of the Judiciary Committee he is causing serious problems not only for Federal Courts, many of which are short-handed, but also for those turning to the Courts for justice.
>
> Could it perhaps prompt a memo to all Federal Court personnel that even the most tiresome low-level cases warrant impartial consideration of evidence? Plaintiff claims that he has worked with juvenile delinquents who seemed to have a better sense of right and

wrong.

And could the details of this case somehow motivate the legislature to take a closer look at the ADEA? As is stands now, ironically, it provides protection for the employer, not the employee. With millions of oldsters rejoining the work force, punitive damages for excessive malice should be available. It would help a wronged, low-pay employee get professional help, and it would therefore serve to deter wrongdoing by an employer.

Only a dream. But cherished.

APPENDIX

Exhibits A1, A2 & A3	Lower Court Orders (District Court Judgment) (Appeals Court Rejection) (Appeals Court Denial of Rehearing)
Exhibit B1 & B2	Personnel Records
Exhibit C	Defendant's Sales Records
Exhibit D	Plaintiff's Sales Records
Exhibit E	Memo About Contests
Exhibit F	Classified Advertisements
Exhibit G1, G2 & G3	Self-incrimination

(2)

Supreme Court, U.S.
FILED

971983 APR 20 1998

OFFICE OF THE CLERK

JAMES T. WALKER
Petitioner,

v.

THE INSTITUTE FOR ECONOMETRIC RESEARCH

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

54 pp

APPENDIX [1]

		Page
A 1	Summary Judgement of the United States District Court, Southern District of Florida, dated August 27, 1996	1
2	Decision of the United States Court of Appeals for the Eleventh District, dated October31,1997	22
3	Appellee's Motion to file Response to Petition for rehearing is granted by the United States Court of Appeals, dated December1,1997	26
4	Denial of appellant's Petition for rehearing by the United States Court of Appeals, dated January 30,1998	27
B 1	Defendant's list showing age of each employee	28
2	Ages in department where plaintiff was employed	33
C	Defendant's Report of June 16,1992, at 2:58 PM	34
D	Plaintiff's own records	35
E	Announcement of contests for improvement, dated June 1, 1992, by defendant's new director	45
F	Classified ads of July 19, 1992	47
G 1	Defendant's emphasis on need of "building rapport"	48
2	Director and second witness testify that establishing rapport "contravenes the Institute's policies"	49

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[1] Numbered Page 20 in error in Table of Contents which, too late to correct, also should have included the listings shown here.

3 Heart-sickening, blind acceptance of defendant's position despite many other examples of distortions..... 50

APPENDIX A

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF FLORIDA.

CASE NO. 93-6505-CIV-ROETTGER

JAMES T. WALKER,
Plaintiff,

vs.

THE INSTITUTE FOR ECONOMETRIC RESEARCH,
Respondent.
_____/

REPORT AND RECOMMENDATION TO DISTRICT JUDGE

THIS CAUSE is before the Court upon the Defendant's Motion for Summary Judgment (DE 71) ans was referred to United States Magistrate Judge Barry S. Seltzer pursuant to 28 U.S.C. § 636.

I. Defendant's Motion for Summary Judgment

Plaintiff James T. Walker alleges in his *pro se* Second Amended Complaint (DE 27) that The Institute for Econometric Research ("Institute") maliciously and unlawfully terminated his employment in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621-634. The Institute has moved for summary judgment (DE 71) pursuant to Federal Rule of Civil Procedure 56. In support of the motion, it has submitted a memorandum (DE

72), together with deposition transcripts and affidavits (DE 70, 75). In opposition, Walker has filed a responsive memorandum (DE 73), three supplemental memoranda (DE 74, 77, 78), and a "response to reply" (DE 88). The Institute has replied to Walker's filings (DE76, 87).

A. Standard of Review for Summary Judgment Motions

Rule 56© of the Federal Rules of Civil Procedure states:

> [T]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there are no genuine issues as to any material fact and that the moving party is entitled to judgment as a matter of law. . . .

An issue is "genuine" if a "reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed. 2d 202 (1986). A fact is "material" if it must be decided in order to resolve the substantive claim or defense to which the motion is directed. Id.; Hairston v. Gainesville Sun Publishing Co., 9 F.3d 913 (11th Cir. 1993).

The burden is on the moving party to establish the absence of a genuine issue as to any material fact. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed. 2d 142 (1970). Once the movant has satisfied its initial burden, the non-moving party must then go beyond the pleadings to rebut any facts properly presented; it may do so through affidavits or other evidence showing the existence of genuine issues of material fact for trial. Fed. R. Civ. P 56(e); Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 106 S.Ct.

1348, 1355-56, 89 L.Ed 2d 538 (1986); Adickes, 398 U.S. at 160, 90 S.Ct. At 1610; Hairston, 9 F.3d at 918.

Summary judgment is appropriate when the non-moving party cannot establish an essential element on which it bears the burden of proof. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552-53, 91 L.Ed. 2d 265 (1986).

> "In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." Id.

In considering the motion, the Court must construe the evidence and the inferences drawn form the underlying facts in the light most favorable to the party opposing the motion. U.S. v. Diebold, Inc., 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed. 2d 176 (1962). Furthermore, facts asserted by the party opposing a summary judgment motion must be regarded as true if supported by affidavit or other evidentiary material. Coke v. General Adjustment Bureau, Inc., 640 F.2nd 584, 595 (5th Cir. 1981) (quoting 10C Wright and A Miller, Federal Practice and Procedure, § 2727 at 524-30 (1973)).

B. Undisputed Facts

The Institute has been in the business of publishing and selling investment advisory newsletters since 1975. (Ciba Aff., ¶ 2,3; Fosback Dep., 4)[1]. In 1980, it established a

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[1] Affidavits are designated "Aff." with the affiant's name preceding. Depositions are designated as "Dep" with the deponent's name preceding and the page number following. "Walker Dep. I" refers to the transcript of plaintiff's deposition

telemarketing department to sell its newsletters to existing and potential subscribers. (Fosback Dep., 4). On March 30, 1992, the Institute hired James Walker as a telemarketer; he was then age 75. (Walker Dep. I, 42, 114). When Walker began his employment, Andrea Ciba was Director of Telemarketing and David Winfield was Assistant Director (Ciba Aff, ¶ 1, Winfield Dep., 4-6). Ciba subsequently left the Institute, and on June 1, 1992, Winfield replaced her as Director. (Ciba Aff., ¶ 1; Winfield Dep., 6-7; Fosback Dep., 4).

The Institute hired all telemarketers, including Walker, subject to a 90-day probationary period. (Ciba Aff., ¶ 9, 10; Winfield Dep., 8). The duties of a telemarketer included telephone contact (both inbound and outbound calls) with prospective and existing subscribers to inform them of available publications, current specials, and available bonuses if they extended their current subscriptions. (Walker Dep. I, 136-37; Winfield Dep., 33).

Norman Fosback and Glen Parker, owners and managers of the Institute, had implemented a cost/benefit system that incorporated specially-designed aggressive sales techniques (Ciba Aff. ¶ 3, 5-7; Fosback Dep., 3). All new telemarketers were required to complete a two-week training course before beginning their telephone sales; the course included an explanation of quotas and other sales requirements and instruction on methods to overcome sales objections from

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taken on September 20, 1995, and "Walker Dep. II" refers to the transcript of plaintiff's deposition taken on November 6, 1995, and "Walker Dep. II" refers to the transcript of plaintiff's deposition taken on November 6, 1995.

customers.[2] (Ciba Aff., ¶ 3, 12). The telemarketers were also provided a job description and a copy of the Standard Operating Procedures setting forth sales productivity requirements. (Ciba Aff., ¶ 9).

After completing the training course, Walker began working on the telephone on April 27, 1992 (Walker Dep. I, 119, 125-26). On June 17,1992, two weeks before the end of the 90-day probationary period, the Institute terminated Walker's employment. (Walker Dep. I, 31, 49-50, 145; Winfield Dep., 35-36; Fosback Dep., 20-21; Winfield Dep., Ex. 4).

C. Legal Analysis

The ADEA makes it "unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment because of such individual's age." 29 U.S.C. § 623(a). The plaintiff bears the ultimate burden of proving that age was a determinative factor in the employer's decision to terminate the employment. Young v. General Foods Corp., 840 F.2d 825, 828 (11th Cir. 1988), *cert. denied*, 488 U.S. 1004, 109 S.Ct. 782, 102 L.Ed.2d 774 (1989). To avoid summary judgment, a plaintiff must initially make out a *prima facie* case of age discrimination. Palmer v. Dist. Bd. Of Trustees of St. Petersburg Junior College, 748 F2d 595, 599 (11th Cir. 1984).

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[2] For example, the Institute instructed telemarketers how to handle up to five objections from a customer, after the fifth objection, it directed them to persuade the customer to purchase a gift for someone else. It instructed its telemarketers to them attempt to sell one of the Institute's other newsletters. Winfield Dep. 21).

A *prima facie* case of discrimination may be established by any of three methods: (1) direct evidence of discriminatory intent; (2) statistical proof of a pattern of discrimination; or (3) the four-prong test set out in McDonnell Douglas Corp. v. Green. 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), under which the presentation of circumstantial evidence raises a rebuttable presumption of intentional discrimination.[3] Isenbergh v. Knight-Ridder Newspaper Sales, Inc., 84 F.3d 1380, 1384 (11th Cir. 1996); Walker v. NationsBank of Florida N.A., 53 F.3d 1548, 1555 (11th Cir. 1995); Carter v. City of Miami, 870 F.2d 578, 581 (11th Cir. 1989).

1. Direct evidence

Evidence that "establishes discriminatory intent without inference or presumption" is direct evidence. Clark v. Coats & Clark, Inc., 990 F.2d 1217, 1226 (11th Cir. 1993). *See also* Carter, 870 F.2d at 581. By contrast, evidence that only "suggests discrimination, leaving the trier of fact to *infer* discrimination based on the evidence," is circumstantial evidence. Earley v. Champion International Corp., 907 F.2d 1077, 1081-82 (11th Cir. 1990) (emphasis in original); Martin v. Ryder Distribution Resources, Inc., 811 F. Supp. 658, 661 (S.D. Fla. 1992) Moore, J.), *aff'd*, 16 F.3d 1232 (11th Cir. 1994). When confronted with direct evidence of discrimination, "an employer must prove that the same employment decision would have been made absent

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[3] The Supreme Court recently acknowledged that many circuits utilize the Title VII McDonnell Douglas framework in analyzing ADEA cases. The Court, however, left open the question of whether McDonnell Douglas should be applied in ADEA cases. O'Connor v. Consolidated Coin Caterers Corp., ____U.S.____, 116 S.Ct. 1307, 134 L.Ed.2d 433 (1996).

discriminatory intent." Carter, 870 F.2d at 581.

Walker contends that David Winfield was the only individual at the Institute to discriminate against him. (Walker Dep. I, 107, 109; Walker Dep. II, 14). Walker points to only one statement by Winfield as direct evidence of age discrimination; on Walker's first day, Winfield purportedly stated: "James, you will report tomorrow at 10 o'clock and at that time every morning and just at that time every morning from then on." (Walker Dep. I, 90).[4] Walker characterizes this statement as "hostile" because of Winfield's facial expression of revulsion, his abruptness, and his failure to shake hands, say hello, or smile. (Walker Dep. I, 85, 88, 96098, 105-05, 172). Walker believes that the only reason that Winfield would have treated him in this manner is because Walker had "white hair."[5] (Walker Dep. I, 105).

In this Circuit, "only the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of age . . . constitute direct evidence of discrimination." Earley, 907 F.2d at 1081. "[F]acially neutral comments from which a plaintiff has inferred discriminatory intent, are not directly probative of discrimination." Carter, 879 F.2d at 581. Because Winfield's alleged statement leaves the trier of fact to infer discrimination, it is circumstantial and not direct evidence.

2. Statistical Evidence

Walker alleges in his Second Amended Complaint (DE

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[4] Walker testified that this statement constituted the entire conversation. (Walker Dep., I, 97-98).

[5] Presumably, Walker uses the term "white hair" to mean "elderly."

27, ¶ 3(b)) that an age-based statistical imbalance existed in the Institute's workforce. Specifically, he contends that the telemarketing department consisted of approximately 60 employees, approximately half of whom were female and half of whom were male.[6] Walker acknowledges a wide-range of ages among the females; but, he claims that there were no male employees between the ages of 40[7] and 70 and that he was the only male in the 70 to 80 age bracket. He further states that only two or three employees were in the 30 to 40 age bracket. According to Walker, most employees were in their twenties.[8]

Walker testified in his deposition that these "statistics" demonstrate age discrimination because a large number of older individuals reside in Broward Count,[9] yet few people in the protected age group worked in the Institute's telemarketing department. (Walker Dep. I, 95-97, 162;

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[6] Walker has not alleged sex discrimination; therefore, his dichotomy between male and female is irrelevant.

[7] The ADEA protects employees who are 40 years of age and older. 29 U.S.C. § 631(a).

[8] Walker's numbers are not statistics in the formal sense. For purposes of this motion, however, the undersigned will assume that Walker's "statistics" are correct. However, according to Glen Parker, Chairman of the Institute, on the day Walker was terminated, the Institute employed 98 individuals; 42 were over the age of forty. Of the 98 total employees, 45 worked in the telemarketing department; 16 of these employees were over the age of 40. (Parker Aff., ¶ 3, Ex. I).

[9] Walker does not offer any further information about the age composition of Broward County residents.

Walker Dep. II, 7). Despite his allegations of statistical imbalance, Walker testified that the Institute did not discriminate in its hiring process (Walker Dep. I, 42, 163) or in its training program (Walker Dep. I, 124) and that he was not aware of any discrimination against others. (Walker Dep. I, 163).

To establish a *prima facie* case by statistical evidence, a plaintiff must come forward with evidence that shows a "pattern of discrimination" and that gives rise to an inference of discrimination. Pace v. Southern Railway System, 701 F.2d 1381, 1388 (11th Cir.1983), *cert. denied*, 464 U.S. 1018, 104 S.Ct. 549, 78 L.Ed.2d 724 (1983). The Sixth Circuit has explained the relevance of statistical proof:

> Statistics gain relevance in one of two ways: the statistics, standing alone, reasonably lead to a particular conclusion validated by human experience, or comparative statistics point out discrepancies in behavior that would cause the average person to scrutinize the employer's motive. Unless the statistics, standing alone or in comparison, are sufficient to lead the mind naturally to the conclusion sought, they have no probative value; they do not move the proof one way or another.

Simpson v. Midland-Ross Corp., 823 F.2d 937, 943 (6th Cir. 1987).

Additionally, "[t]he statistics used to buttress a claim should relate to the particular employment practice at issue." Neloms v. Southwestern Electric Power Co., 440 F. Supp. 1353, 1369 (W.D. La. 1977). Here, Walker has failed to place his statistics in proper context. He complains of discrimination in his employment termination, but he has not

attempted to compare the number of employee discharges from the protected group with that of a younger group.[10] Instead, he attempts to compare the ages of the Institute's telemarketers with the population of older individuals residing in Broward County, statistics more suitable to attacking hiring policies. The statistics proffered by Walker bear no relation to the Institute's alleged discriminatory discharge of employees; they therefore fail to raise an inference of age discrimination. *See* Pace, 701 F.2d at 1388 ("[A] statistical analysis of promotions would be persuasive evidence of discrimination only if plaintiff proffered evidence of the percentage of persons in the protected group who were promoted compared to the percentage of persons outside the protected group who were promoted."). Walker, therefore, has failed to establish a *prima facie* age discrimination case by statistical proof.

3. Circumstantial Evidence

Even though a plaintiff may be unable to show intentional discrimination by direct or statistical evidence, the Supreme Court has developed an indirect method of proof by which a plaintiff may satisfy his burden with circumstantial evidence. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). In deciding ADEA cases, this Circuit has adopted the Title VII traditional burden-shifting framework of McDonnell Douglas, as later refined in Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981) and St. Mary's Honor

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[10] The undersigned notes, however, that two other telemarketers were discharged at the same time as Walker; Walker estimates that both of these individuals were in their mid-thirties. (Walker Dep. I, 102).

Center v. Hicks, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). *See, e.g.*, Isenbergh, 84 F.3d at 1332 n.5; Walker, 53 F.3d at 1556. Under McDonnell Douglas and Burdine, the plaintiff must first establish, by a preponderance of the evidence, a *prima facie* case of discrimination.[11] Burdine, 450 U.S. at 252-53, 101 S.Ct. at 1093-94; McDonnell Douglas, 411 U.S. At 802, 93 S.Ct. At 1824; Walker, 84 F.3d at 1548. By establishing a *prima facie* case, the plaintiff creates a rebuttable presumption that the employer unlawfully discriminated against him. Hairston, 9 F.3d at 919 n.8.

The burden then shifts to the employer "to articulate some legitimate, non-discriminatory reason" for the adverse employment action. McDonnell Douglas, 411 U.S. at 802, 93 S. Ct. at 1824. "Because the defendant need only produce, not prove, a nondiscriminatory reason, this burden is 'exceedingly light.'" Walker, 53 F.3d at 1556 (quoting Perryman v. Johnson Products Co.,Inc., 698 F.2d 1138,1142 (11th Cir. 1983)). "'If the defendant carries this burden of production, the presumption raised by the *prima facie* case is rebutted' . . . and 'drops from the case.'" Hairston, 9 F.3d at 918 (quoting Burdine, 450 U.S. at 255 and 255 n.10, 101 S. Ct. at 1095 and 1095 n.10).

Once such a justification is proffered, the plaintiff must demonstrate by a preponderance of the evidence that the

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[11] On a defendant's motion for summary judgment, before a plaintiff must make any evidentiary showing, the defendant must demonstrate that the plaintiff lacks evidence that could establish a *prima facie* case. *See* Celotex, 477 U.S. at 323, 325, 106 S.Ct. At 2553-54; Dickson v. Amoco Performance Products, Inc., 845 F. Supp. 1565, 1569 (N.D. Ga. 1994). The Institute has met this burden.

employer had a discriminatory intent."[12] Batey v. Stone, 24 F.3d 1330, 1333 (11th Cir. 1994). "The fact finder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspension of mendacity) may, together with the elements of the *prima facie* case, suffice to show intentional discrimination." Hicks, ___ U.S. at ___, 113 S.Ct. At 2749. Although "'[n]o additional proof of discrimination is required' to support a finding of intentional discrimination," id. (Quoting Hicks v. St. Mary's Honor Center, 970 F.2d 487, 493 (8th Cir. 1992)), "rejection of the defendant's proffered reasons does not compel judgment for the plaintiff as a matter of law." Batey, 24F3d at 1333. The

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[12] The Supreme Court slightly modified the McDonnell Douglas/Burdine analysis in St. Mary's Honor Center v. Hicks, 509 U.S. 542, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). "Previously, a plaintiff could satisfy [his] Title VII burden of proof 'either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of belief.'" Batey, 24 F.3d at 1334 n. 12 (quoting Burdine, 450 U.S. at 256, 101 S.Ct. At 1095). *See also* Miranda v. B & B Cash Grocery Store, Inc., 975 F.2d 1518 (11th Cir. 1992). "In other words, 'the falsity of the employer's explanation [was] alone enough to compel judgment for the plaintiff.'" Batey, 24 F.3d at 1334 n. 12 (quoting Hicks, ___ U.S. at ___, 113 S.Ct. At 2752). Under Hicks, however, if "the defendant has succeeded in carrying its burden of production, the McDonnell Douglas framework – with its presumptions and burdens – is no longer relevant." Hicks, ___ U.S. at ___, 113 S.Ct. At 2749. Instead, the sole inquiry becomes whether the plaintiff has proven that the defendant intentionally discriminated against [him] because of [his age]." Id. *See also* Isenbergh, 84 F.3d at 1385-1386 (discussing Hicks); Walker, 54 F.3d at 1556 (discussing Hicks).

risk of nonpersuasion always remains with the plaintiff. Hicks, ___ U.S. at ___, 113 S.Ct. At 2747. Accordingly, "a plaintiff must show both that the defendant's reason was false and that the real reason was discrimination." Isenbergh, 84 F.3d at 1386. *See also* Walker, 54 F.3d at 1556 ("[O]nce the defendant has met its burden of production . . . the sole inquiry is whether the plaintiff successfully carries the burden of persuading the trier of fact that the defendant engaged in intentional discrimination on the basis of a prohibited factor.").[13]

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[13] The Eleventh Circuit has provided guidance as to the nature of plaintiff's burden at this stage of the analysis upon a defendant's motion for summary judgment:

> The burden to avoid summary judgment is not to show . . . that the reasons stated [by the defendant for the adverse employment action] were pretext. Rather, plaintiff's burden at summary judgment is met by introducing evidence that could form the basis for a finding of facts, which . . . could allow a jury to find by a preponderance of the evidence that the plaintiff has established pretext. . . . The only issue to be considered by the judge at summary judgment is whether the plaintiff's evidence has place material facts at issue.

Hairston, 9 F.3d at 921 (citations omitted). *See also* Kennedy v. GN Danavox, 928 F. Supp. 866, 872 (D. Minn. 1996)(Upon defendant's summary judgment motion, a plaintiff "must demonstrate an ability to prove the four *prima facie* elements and he must establish the existence of facts which if proven at trial would permit a reasonable jury to conclude that the employer's proffered reasons were pretextual and that intentional discrimination was the true reason for the termination decision.").

An employee establishes a *prima facie* case of age discrimination in termination by showing "(1) membership in a protected class, (2) qualification for the position held, (3) termination, (4) and replacement with a [substantially younger] person[14]. . . ." Walker, 53 F.3d at 1556. This Circuit, however, has cautioned against applying an "overly strict formulation of the elements of a *prima facie* case test is simply 'whether the plaintiff has presented sufficient evidence to provide a basis for an inference that age was a factor in the employment decision.'" Isenbergh, 84 F.3d at 1385 (quoting Pace, 701 F.2d at 1387).

It is undisputed that Walker has met the first and third elements of his *prima facie* case; has was a member of the protected age group, and the Institute terminated has employment. Walker, however, has failed to proffer any evidence to satisfy the fourth element; he has not shown that he was replaced by anyone, much less by a substantially

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[14] In setting forth the test for a *prima facie* case of discrimination, courts often articulate the fourth element as requiring replacement of the plaintiff by an individual "outside the protected class." This Circuit, however, does not require an ADEA plaintiff to show that the replacement was younger than 40. *See, e.g.*, Isenbergh, 84 F.3d at 1384 n.1, Walker, 53 F.3d at 1548 n.12; Carter, 870 F.2d at 583; Pace, 701 F.2d at 1387. Moreover, the Supreme Court recently held that the requirement of showing that an ADEA plaintiff was replaced by an individual outside the protected class was not a proper element of a McDonnell Douglas *prima facie* case; rather, a showing that the plaintiff was replaced by another worker substantially younger is a more reliable indicator of age discrimination. O'Connor v. Consolidated Coin Caterers Corp., ___U.S. ___, ___, 116 S.Ct. 1307, 1310, 134 L.Ed. 2d 433 (1996).

younger person.

The Institute argues that Walker has also failed to establish the second element – that he was qualified for the position. The company contends that it discharged Walker for deficient performance. A showing of deficient performance defeats the second element of the *prima facie* case, and at the same time, provides a legitimate, nondiscriminatory reason for an employee's termination. The Court must examine the Institute's proffered reason for Walker's termination and then determine whether Walker has presented sufficient evidence from which a reasonable jury could find that the reason was pretextual and that the true reason was age discrimination.

The Institute maintains that Walker did not utilize the company's sales techniques and that he consistently failed to meet its productivity requirements. (Winfield Dep., 20-21, 39, 31, 33; Ciba Aff., ¶ 18). The Institute evaluated its telemarketers' performance based on "productivity" rather than gross sales. It calculated "productivity" by subtracting $60 (the average mail-in order from direct mail advertising) form the sales price of orders obtained by a telemarketer. (Ciba Aff., ¶ 5). And it determined "productivity per hour" by dividing each telemarketer's total "productivity" by the number of hours worked. (Ciba Aff., ¶ 9). The supervisors, the Director, and the Assistant Director of Telemarketing all reviewed the computer-generated productivity reports monthly. (Ciba Aff., ¶ 8).

The Institute required its new telemarketers to maintain a minimum of $60 to $75 per hour in sales. (Ciba Aff. ¶ 9,12; Walker Dep., Ex. 4). The Institute contends that Walker did not once reach the expected productivity per hour

and showed no promise of improvement. The sales productivity reports reflect that walker's productivity in May 1992 was $3.62 per hour (Winfield Dep., 43, Ex. 5), and during the first two weeks of June 1992 fell to negative $2.44 per hour.[15] (Winfield Dep., 46, Ex. 5). Although Walker testified that the expected productivity was $50 per hour, based upon his own calculations, he met that quota only once, two days before he was terminated.[16] (Walker Dep. I, 146). Winfield testified, however, that reaching the quota once during the probationary period would not satisfy the Institute's productivity requirements. (Winfield Dep., 11).

Defendant also maintains that Walker did not utilize the aggressive sales techniques that the Institute taught and required. These sales techniques were designed to sell newsletter subscriptions to new customers or to sell additional newsletter subscriptions to existing customers by encouraging them to upgrade their current subscription to a multi-year subscription ("boosting"), and /or by persuading them to subscribe to additional newsletters ("cross-selling"). Walker did not attempt to boost sales or to cross-sell; he tried to establish rapport and acquaint himself with his customers rather than to promptly close the sale and proceed to the next

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[15] Because of the $60 productivity adjustment, a telemarketer could have a negative average production if sales fell below $60.

[16] Walker testified at his deposition that his average per hour sales between June 3 and June 9, 1992, was $12.20, and between June 10 and June 16, 1992, was $27.40. On June 15, 1992, his average per hour sales was $51.63. (Walker Dep. I, 148-156). These figures, however, do not take into account the $60 productivity adjustment.

caller. (Winfield Dep. 20-21, 29, 31, 33; Ciba Aff., ¶ 18). Both Ciba and Winfield testified that they advised Walker that establishing a rapport with the caller contravened the Institute's policies (Winfield Dep., 29, 31-33, Ciba Aff. ¶ 15). In his 30-day evaluation, Winfield rated Walker unsatisfactory in boosting, cross-selling, and gift subscriptions (Winfield Dep. 25-33, Ex. 4), and in his 60-day review, he noted that Walker "forgets that his purpose is to sell."

Additionally, the Institute contends that Walker did not comply with its requirement that he be on the phone 50 minutes out of every hour. (Winfield Dep., 30; Walker Dep. I, 94-95). Instead of following the company's procedure to complete forms while on the telephone with the customer, Walker (due to his illegible handwriting) would first write the information on a pad and then transfer the information to the appropriate form. (Walker Dep. I, 92- 94, 98-99; Walker Dep. II, 23-26; Walker Ex., 8, 15; Winfield Dep., 51-52; Ciba Aff. ¶ 16). When he was busy transferring the information, Walker would refuse to open his lines to receive incoming calls (Walker Dep. I, 94-95). On May 6, 1992, a supervisor gave Walker a warning for being off the telephone 25 out of 30 minutes. (Walker Ex., 1).

To rebut this evidence, Walker argues that he was qualified for the position because his 90-day probationary period had not expired.[17] He bases his belief that he was not

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[17] Walker also argues he was qualified for position because his performance was improving, his attitude was good, his work habits were exceptional, he was scrupulous about being on time, and he seldom took his allotted breaks. (Walker Dep. I, 82-83). Even if true, these allegations would not rebut the Institute's

subject to discharge during the probationary period upon two paragraphs of the Employee Manual:

> All employees are hired subject to a 90-day probationary period during which time their performance is evaluated to determine if their work is satisfactory.
>
> Your retention upon the conclusion of this probation period does not constitute an agreement by the Institute to retain you as an employee permanently, or for any set period.

(Walker Dep., Ex. 4, p.2).

According to the Institute, however, probationary employees could be terminated at any time during the probationary period if they failed to meet the Institute's sales requirements. (Winfield Dep., 8, 9; Fosback Dep., 27, 30; Ciba Aff. ¶ 11). Winfield, Ciba, and Fosback all testified that it was common practice for the Institute to terminate probationary employees. (Winfield Dep., 8-9, Ex. 2; Ciba Aff. ¶ 11; Fosback Dep. 20,30). Moreover, the Standard Operating Procedures handbook provided to Walker described both the productivity and telephone time requirements. The handbook clearly stated: "Employees who fail to meet this quota will be terminated within their probationary period." (Winfield Dep., 12, Ex. 2) (emphasis added). Walker's subjective interpretation of the Employee Handbook is unreasonable and does not show either that he was qualified for the position or that the Institute's proffered reason for termination was pretextual. *See* Clark, 990 F.2d

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evidence of insufficient productivity, inadequate time on the telephone, and failing to use required sales techniques.

1217, 1228 (To show pretext, plaintiff must present concrete evidence in the form of specific facts).

Nor has Walker offered any further evidence showing that the real reason for his termination was age discrimination. Walker points to several incidents of alleged age discrimination: Walker's desk was placed directly in front of Winfield's desk (Walker Dep. I, 92); on two occasions, Winfield told Walker to "open his line" (accept incoming calls) before he had finished filling out the required forms (Walker Dep. I, 92-95); on one occasion, Winfield told Walker to "open his line" at a time he was supposed to be on break (Walker Dep. I, 99-100); and Winfield may have terminated him to keep him from winning a contest award for the most improved performance (Walker Dep. I, 103-04, 106). Walker, however, has failed to show any nexus between his age and Winfield's actions. At best, Walker's proffered evidence shows that Winfield personally disliked him; however, it cannot be reasonably inferred that Winfield's negative feelings or actions towards Walker were based on age. As the Eleventh Circuit has stated: "Serious personality clashes may be an unwelcome reality of the workplace, and may lead . . . to unfortunate consequences for employees. . . . Nevertheless, such clashes do not, without more, form the basis for relief under . . . the ADEA." Walker, 53 F.3d at 1558.

II RECOMMENDATION

Walker has failed to come forward with sufficient evidence form which a reasonable jury could conclude that he was qualified for the position of telemarketer or that the Institute's proffered reason for his termination – deficient performance – was pretextual. And, viewed in the light most

favorable to Walker, his proffered evidence is insufficient as a matter of law to allow a reasonable fact finder to infer intentional discrimination based on age. Accordingly, the undersigned hereby RECOMMENDS that Defendant's Motion for Summary (DE 71) be GRANTED.

The parties will have ten (10) days form the date of being served with a copy of this Report and Recommendation within which to file written objections, if any, with the Honorable Norman C. ROETTGER, United States District Judge. Failure to file objections timely shall bar the parties form a *de novo* determination by the district judge of an issue covered in the report and shall bar the parties form attacking on appeal factual findings accepted or adopted by the district court except upon grounds of plain error or manifest injustice. *See* 28 U.S.C. § 636(b)(1); Nettles v. Wainwright, 677 F.2d 404, 410 (5th Cir. Unit B 1982) (en banc).

DONE and ORDERED in Fort Lauderdale, Florida, this 27th day of August 1996.

/s/ Barry Seltzer
BARRY S. SELTZER
United States Magistrate Judge

Copies to:

Honorable Norman C. Roettger

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 96-5317
Non-Argument Calendar

D. C. Docket No. 93-6405-CIV-NCR

JAMES T. WALKER,

Plaintiff-Appellant,

versus

THE INSTITUTE FOR ECONOMETRIC RESEARCH,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(October 31, 1997)

Before TJOFLAT, COX, and BIRCH, Circuit Judges.

PER CURIAM:

In this employment discrimination case filed pursuant to the Employment Act of 1967 (ADEA), 29 U.S.C. § 621-634, James T. Walker, proceeding *pro se*, appeals the district court's order granting summary judgment in favor of the institute for Econometric Research (the "Institute"). For the reasons that follow, we affirm.

It is difficult to discern the precise basis of Walker's discrimination claim; although references to direct, circumstantial, and statistical evidence are contained in his appellate brief, we interpret the primary issue on appeal to be that there exists circumstantial evidence in this case from which a reasonable fact finder might infer intentional discrimination based on age.

In cases brought under the ADEA, the plaintiff bears the ultimate burden of proving that age was the determinative factor in the employer's decision to terminate him. *See* Anderson v. Savage, 675 F.2d 1221, 1224 (11th Cir. 1982). A plaintiff establishes a *prima facie* case of age discrimination by showing (1) membership in a protected age group; (2) qualification for the position sought or held; and (3) evidence by which a fact finder might reasonably conclude that the employer intended to discriminate on the basis of age. Walker v. NationsBank of Florida, N.A., 53 F.3d 1548, 1557 (11th Cir. 1995). Once the plaintiff establishes a *prima facie* case, the employer must articulate a legitimate, non-discriminatory reason for its employment decision. Id. The burden then shifts back to the plaintiff to demonstrate by a preponderance of the evidence that the employer's asserted rationale was a pretext for discrimination. Id.

The Institute publishes and sells investment advisory

newsletters. In 1992, Walker was hired at the age of seventy-five to work as a telemarketer in the institute's telemarketing department, the function of which is to sell the Institute's newsletters to existing or potential customers. All telemarketers are hired by the Institute subject to a ninety-day probationary period. Prior to beginning their sales positions, telemarketers must complete a training course; that course involves instruction as to the Institute's sales techniques and evaluation of the new employees. New employees are advised that they must meet certain quotas regarding productivity and telephone contact within their probationary period.

The district court found that Walker had failed to establish a *prima facie* case of age discrimination. Specifically, the court determined that Walker had failed to show either that he had been replaced by a younger person or that he was qualified for the position at the time he was terminated. Even assuming that Walker has established a *prima facie* case of age discrimination, however, we conclude that the Institute has proffered legitimate, non-discriminatory reasons to justify its decision to discharge Walker. The Institute has provided evidence that Walker did not perform to the Institute's satisfaction during his probationary period; for instance, Walker had low productivity and failed to comply with the Institute's required sales' techniques and operating procedures. Walker does not dispute that he disagreed with the Institute's philosophy regarding phone contact with customers, nor does he deny that he was unable to meet the Institute's requirement that he spend at least fifty minutes per hour attempting to advance sales on the phone. Walker not only fails to refute the Institute's proffer

of non-discriminatory reasons to terminate him within his probationary term, but also fails to establish any nexus between his termination and discrimination specifically on the basis of age. We conclude that the district court properly granted summary judgment in favor of the Institute. Accordingly, we AFFIRM.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 96-5317

JAMES T. WALKER,

Plaintiff-Appellant,

versus

THE INSTITUTE FOR ECONOMETRIC RESEARCH,

Defendant-Appellee.

On Appeal form the United States District Court for the Southern District of Florida

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ORDER:

The Appellee's motion for leave to file response to petition for rehearing is GRANTED.

/s/ Stanley F. Birch, Jr.
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 96-5317

JAMES T. WALKER,
Plaintiff-Appellant,

versus

THE INSTITUTE FOR ECONOMETRIC RESEARCH,
Defendant-Appellee.

On Appeal form the United States District Court for the Southern District of Florida

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BEFORE: TJOFLAT, COX, and BIRCH, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by the Appellant, James T. Walker, is DENIED.

ENTERED FOR THE COURT:

/s/ Stanley F. Birch, Jr.
UNITED STATES CIRCUIT JUDGE

ORD-41

APPENDIX B

Employees June 17, 1992

Name	Date of Birth	Age	Date of Hire	Position
Alford, Adrian	08/27/69	22	11/01/91	Researcher
Alberts, Barbara	05/04/30	62	03/24/87	Telephone Operator
Allen, Eric	10/05/61	30	03/07/92	Mail Room Clerk
Anglin, Randal	08/10/68	23	04/16/92	Telemarketer
Appel, Joan	04/30/33	59	02/25/85	Secretary
Bain, Glenda	01/26/42	50	04/07/92	Telemarketer
Barnett, Carol	06/25/38	54	01/03/91	Typist
Benson, Virginia	12/02/08	83	03/10/77	Secretary
Benigno, George	07/05/51	40	05/14/90	Researcher
Berrios, Lycinda	00/22/72	19	05/14/92	Telemarking Clerk
Veverley, Whitney	03/07/61	31	06/06/88	Data Entry
Blanchard, Wilburta	03/27/20	72	06/10/85	Mail Room Clerk
Boomer, Jared	12/26/71	20	07/01/91	Asst. TM Sup.
Bower, Christina	08/18/71	20	04/06/92	Accounting
Bowers, Paul	10/09/37	54	08/10/82	Mail Room Supervisor
Brainerd, Ronald	12/01/65	26	12/0988	Mail Room Clerk
Bravo, Cecilia	04/12/61	31	03/16/92	Telemarketer
Brooks, Elrett	09/25/50	41	05/18/92	Telemarketer
Campbell, Ann	06/12/49	43	04/15/91	Telemarketer

Name	Date of Birth	Age	Date of Hire	Position
Carlisle, Kathleen	03/19/41	51	08/14/89	Telemarketer
Corinthian, Mauvalyn	10/13/64	27	05/18/92	Telemarketer
Daniel, Donna	10/31/71	20	04/03/92	Telemarketer
Dashiell, Millie	10/16/55	36	11/04/91	Asst. TM Sup.
Decavallas, Anthony	8/13/70	21	01/27/92	Telemarketer
DeLaFuente, Nancy	10/13/34	57	10/07/80	Mail Room Clerk
DeLaleu, Robert	12/11/44	47	12/16/91	Mail Room Clerk
Durbin, Bonnie	06/01/38	54	08/21/89	Asst. TM Sup.
Elinoff, Edward	11/16/58	33	04/11/88	Administration
Engel, Julie	04/05/69	23	06/12/91	Researcher
Ericksmoen, Dianne	06/19/64	28	01/03/91	Data Entry
Errante, Lenore	04/19/31	61	06/06/83	Accounting Supervisor
Feigay, Dorris	07/08/29	62	08/28/87	Telemarketer
Fergile, Diana	09/13/64	27	06/26/89	Telemarketer
Ferguson, Lisa	04/17/72	20	12/12/92	Mail Room Clerk
Fernandez, Sandra	12/31/67	24	01/13/92	Telemarketer
Flynn, Martin	01/23/47	45	05/20/91	Mail Room Clerk
Fosback, Norman	07/15/47	44	10/13/71	President
Founier, Lse	07/20/39	52	09/22/86	Mail Room Clerk
Gharakhanian, Yvette	04/27/65	27	06/03/85	Data Entry Supervisor

Name	Date of Birth	Age	Date of Hire	Position
Gonzalez, Roschelle	11/24/56	35	02/14/92	Artist
Hadhazy, Allan	08/26/64	27	10/19/87	Researcher & Programmer
Hardaway, Dixie	02/22/57	35	11/07/89	Telemarketer
Hawrey, Sheryl	11/09/68	23	03/28/88	Data Entry
Hyde, Grace	07/08/26	65	11/19/81	Telemarketer
Irving, John	11/03/67	24	04/06/92	Accounting
Isaac, Gemma	03/04/64	28	01/20/92	Telemarketer
Jacobs, Kelsey	11/10/69	22	04/06/92	Telemarketer
James, Lancelot	09/27/65	26	03/16/92	Telemarketer
Jean-Louis, Emilio	12/11/63	28	11/07/91	Accounting
Johnson, Bernice	12/27/29	62	02/14/83	File Clerk
Keith, Banjamin	10/25/55	36	01/23/92	Data Entry
Kendzior, Kerry	04/07/70	22	07/23/91	Telemarketer
Klein, Deborah	10/30/64	27	04/23/91	Mail Room Clerk
Korn, Patricia	08/14/39	52	12/17/81	Mail Room Clerk
Kozusnik, Linda	06/04/54	38	10/12/84	Mail Room Clerk
Lammel, Friederike	09/09/29	62	05/14/90	Researcher
Leeea-Kowalski, Kathy	12/31/58	33	07/10/89	TM Training
Lugo, Delma	01/08/52	40	02/20/92	Telemarketer
Markarevich, Frances	04/24/24	68	04/02/79	Secretary

Name	Date of Birth	Age	Date of Hire	Position
McAvoy, Janice	04/16/71	21	01/22/92	Mail Room Clerk
Mescal, Robert	03/12/13	-79	10/10/88	Researcher
Morgan, Deanne	11/28/63	27	12/02/91	Accounting
Motta, Denise	11/29/63	28	06/09/86	Mail Room Clerk
Miur, Newton	04/07/62	30	05/29/90	Accounting
Nardini, Preciosa	03/11/52	40	02/14/89	Accounting
Orlove, Stephen	06/17/58	34	10/24/91	Researcher
Paquin, Margaret	04/26/12	80	11/12/84	Telemarketer
Parker, Glen	10/06/36	55	10/13/71	Chairman
Paulsen, Dianne	04/26/40	52	08/26/91	Telemarketer
Piazza, Patricia	12/01/55	36	04/06/92	Secretary
Ramsay, Sheri	04/14/65	27	11/01/89	Data Entry
Randell, Susan	04/26/47	45	01/21/85	Research Supervisor
Revkin, Warren	05/11/68	24	03/25/91	Telemarketer
Ridhardson, Marion	06/05/61	31	09/21/91	Telemarketer
Rittter, Bonnie	12/28/43	48	01/16/90	Telemarketer
Rodiguez, Mary	07/05/40	51	11/30/87	Accounting
Rosenhoch, Alan	07/16/68	23	03/26/92	Data Entry
Rosenthal, Mary	01/06/33	59	03/04/92	Telemarketer
Schwartz, Joanne	04/10/59	33	06/11/91	Telemarketer
Scigliano, Mary	06/20/26	66	05/31/83	Accounting
Shirk, George	04/06/55	37	07/02/90	Researcher/TM

Name	Date of Birth	Age	Date of Hire	Position
Shortell, Margaret	01/09/56	36	01/22/92	Mail Room Clerk
Sliker, Jacqueline	04/11/32	60	01/20/92	Telemarketer
Smith, Tonya	02/01/71	21	03/16/92	Telemarking Clerk
Spence, Edith	12/25/55	36	05/20/91	Asst. TM Sup
Stringer, Denise	10/24/60	31	05/18/92	Telemarking Clerk
Tillson, Martin	08/10/33	58	08/18/88	Mail Room Clerk
Tribie, Bernard	04/09/71	21	05/18/92	Telemarketer
Tynes, Felicia	12/10/70	21	11/04/91	Asst. TM Sup.
Vega, Angela	07/12/69	22	09/26/88	Telemarketer
Viehmann, Mark	09/09/51	40	05/11/82	Accounting
Wagner, Jeanne	07/27/32	59	12/17/86	Telemarketer
Walker, James	07/18/16	75	03/30/92	Telemarketer
Walsky, Babette	11/19/25	66	11/04/91	Telemarketer
Walters, Arlene	08/04/39	52	04/03/89	Telemarketer
West, Veneta	04/06/65	27	11/04/91	Telemarking Clerk
Williams, Rohan	07/30/72	19	03/26/92	Computer Technician
Winfield, David	02/06/69	23	05/15/87	Subscriber Services Supervisor

LAST NAME	FIRST NAME	AGE
Anglin	Randal	21
Boomer	Jared	20
Brooks	Elrett	41
Decavallas	Anthony	21
James	Lancelot	26
Revkin	Warren	24
Richardson	Marlon	31
Tribie	Bernard	21

Average age: 26

APPENDIX C

IER[1] Transaction Report for Walker, James, in
Telemarketing
for All Transactions
Report Ran on : Tuesday, 06/16/92 at 14:58:27
06/01/92 - 06/15/92

Grand Totals:[2]

Frequency	313
Percent credit card	8
Percent billed	3
Percent paid	0
Average credit card order	58
Average order billed	51
Total credit cards	1388
Total billed	409
Projected dollars per hour	-1.49
Actual dollars per hour	-2.44

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[1] Institute for Econometric Research

[2] With 10 vertical columns describing types of payment, and more than 50 classifications of calls, defendant's exhibit cannot be fairly shown here. It is however an impressive document, developed by Ms. Ciba, sales director until resigning on June 1, 1992. Input for the above was provided by her replacement, Mr. Winfield.

APPENDIX D

Date: 6/3/92[1] Page 1

Name	Certif. Area[2]	Phone	Comment	
Mrs. Seaton	552588/IA		Send FF, Follow	6/13
Mrs. Gregorie	70809/LA	504-359-5288	Send FF, IS	6/12
Kinney	08075/NJ	609-461-9262	Send FF, IS, ML	6/12
Larry Coles	PA	215-638-7257	Send FF	
Ralph Sterns	48335/MI	313-442-0813	Send IS, FF	6/13
Rotholz	19810/MD		Send IS, FF	6/12

Date: 6/5 Page 2

Langenberg	53228		FF, SALE $49.	

1. The first day of my own system, used for certain calls, in order to make effective, follow-up contacts. It was never intended simply to keep track of sales. The record as presented here only slightly resembles the handwritten original, but is it accurate in the basic facts shown.

2. The individual certificate number, entered in computer and on Worksheet, for every subscriber and prospect. Some examples of codes describing transactions and newsletters: CC – credit card sale; OB – outbound call; ID – Investors Digest; FF – Mutual Funds Forecaster; FW – Fund Watch, etc.

Jim Brophy	22192	703-806-6255	Send 3-yr-3-mo.	6/15
Ms. Hewett	30324/GA	404-250-4171	Send IS. Follow	6/12
D. Schampfer	50076		FW SALE 39. ML.	6/19
D. Anderson	92506/CA	714-789-8967	FF,ML,NI, PIMI	6/16

B. Dreisbach	45241/OH	513-563-8892	IS. Follow	6/20
Ferraro	10025/NY	212-866-1636	PIMI (complete pkg.)	6/16
Paul Weir	53611/IL	708-381-0682	"	6/24
Snodgrass	97470/OR	503-672-4203	ID	
Date: 6/6				
Mrs. Panno	44502/OH		ML Follow	6/16
Swift	22308		FF boost 1-3 yrs. Sale $68.	
Dao	20866		(NG)	
Cecere	33434/FL		FF 2 yrs. Sale 68.	

Date: 6/8			Page 4	
Banach	06111/CT		PIMI	6/16
McTighe			ID	
Jackson	30245/GA			
Lord	03079/NH		ML	6/15
Jack Stern	90404/CA	310-453-1933	IS, FF	6/19
			Page 5	
Whatley	31533/GA	912-384-1718	IS	6/28
Profitt	99208		Boost FF SALE 68.	
Wehr	76018/TX			
Penate	33176		FF SALE 49.	
Priebe	48219/MI	313-531-8026	IS, ML	
Requorth	85718/AZ	602-297-5305	IS	6/19
Date: 6/9			Page 6	
Goodman	06117		TI	6/18
Kinney	08075		(p 1 FW OK)	6/17

Miklos	48093/MI		ML	6/17
Vavrin	60638/Chi		PIMI	6/17
Lewis	34689/FL	813-934-7138	IS	
Beracca	94952/CA	707-795-5112	TI	6/19
Merlino	77064		FF Sale 49.	
Dixon	14482	716-768-7270	ID, FF	6/17

Page 7

Tatum	75766		FF Sale 49	6/16
Ann Smith	33629/FL		ML, TI	
Peeke	97470	503-673-5993	FF	
Date: 6/10				
Dyess	75703		FF Sale 49.	
Berking	34287		PIMI	6/17
Dolfman	08103		FF Sale 49.	
Liesen	63104/MO		ML	

Page 8

Boshears	28601/NC	704-328-9963	FF	6/16

Zaborznik	94563/CA	415-376-9025	FF	
Dozenberger	48315/MI	313-781-6734	ID	
Swanson	55345		FF Sale 49.	
Blum	33442		PIMI	6/19
Glazier	46624		PIMI	6/19
Date: 6/10			Page 9	
Chornij	48324	313-363-9563	IS	6/17
Bratley		617-926-8124		6/17[3]
Suckow	54751/WI	715-235-3184	ML	6/17
Date: June 12			Page 10	
Sherman	60062/IL		FF SALE 117.	
Perlingiero	76262/TX		FF SALE 68.	
Meikle	01460/MA		IS, FW, FF SALE 48.	
Raymond	32806/FL		IS, ML	6/19
Gorman	91206/CA	818-547-5969	FF	

3. A typical "service" call to a subscriber for purpose of discussing other letters of possible interest. Timing poor but there was willing agreement that a second call would be made the following week at same time – 3 p.m.

Otto	30388		FF SALE 49.
Volkman	75206/TX	214-712-5758	FF, FW

Geigle	07960/NJ	201-540-0338	IS
Horberg	08873/NJ		IS
Benton	64133/MD	816-353-4715	ID[4]
Shukla	77066/TX	713-580-2675	FW, FF
Gregorie	(Pge.1)	504-359-5288	6/19
Miller	54481		FF SALE 88.

Date: 6/13

Dall	40243	FF SALE 49.
Schimm		FF SALE 49.
Aldridge	75083/TX	TI
Holober	20817	FF
Williams	59817/MN	NI

4. Why no follow-up date? There were times when agreement was on a particular date; times when I decided that myself and often it was left open, which did not imply it was to be forgotten.

Gold	95076/CA		IS	
Pizzoli	94010/CA	415-342-7565	IS	

Page 13

Slaton	30032/GA	404-284-0767	IS, FF	
VanHoff	97231/OR		FW	6/20

Date: 6/15

Page 14

Morgan	32807			6/19
Martin	02878		FF, ML	6/20
Brophy	(Pge. 2)		Almanac	
Lord	(Pge. 4)		Retirement ltr.	6/25
Custard	63367/MO		ID	
Sandmeyer	63109/MO		ID, FF	6/22
Slocum	40006		FF SALE 68.	

Page 15

Kalbas	58478/ND	701-392-5235	ID	6/19
Craig	01960/MA	508-535-6100	ML FF SALE 49.	6/25

Netsky	19116/PA	215-909-5718	ID,FF, PIMI	6/23
Baumgartner	15146/PA		TI SALE 88.	
Malossi	11715		FF SALE 49.	
Kinder	32503/FL		ML SALE 159.	
Date: 6/16			Page 16	
Baer	47624 (?)		IS	6/24
Cecere	(Pge. 4)		FF 68. (?)	
Scott	91304/CA	818-718-8116	FF	6/25
Panno	(Pge. 3)		IS	6/24
Smith	(Pge. 7)		TI SALE 49.	
Nagle	70002/LA		PIMI	6/24
Fuhr	18657/PA	717-836-2894	FF	6/23
Boshears	(Pge. 8)		FF	
Pearson	14127/NY	617-662-7100	IS, FF	
Jones	75044/TX	214-530-1749	ID	6/23
Caniveau	54114/TX	715-854-2156	ID	

Note: All the foregoing is simply a bare-bones restructuring of original records, which are available. The page following illustrates how the data collected was used to plan the next day's calls.

WEDNESDAY, JUNE 17

Hunter (2A)[1]
Horan (3A)
Kalbas in N. D. 58478. Check re sample ID sent
Berking 7[2]
Liesin 7
Anderson 2 –
Hewitt 2
Sterns 1
Ratholz 1
Cochran 1A
Ferros 3
Bratley 9
Sukow 9
Dixon – 7

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[1] This refers to a previously used system, not as satisfactory as the one shown here. In present system, pages on one side of a loose-leaf binder listed the results of certain calls as they took place. The other side of the binder was for a one-page daily listing of calls to be made. As indicated here, it was based on the foregoing record. A few minutes in the evening would suffice to scan the record and plan the next day's calls.

[2] Page number in records.

APPENDIX E

(MONDAY MORNING MEETING,
WINFIELD'S FIRST DAY AS DIRECTOR.)

MEMORANDUM

To: Telemarketing

From: David Winfield

Re: Contests

Date: June 1, 1992

Inbound New Orders and Renewals

The top seven employees with the highest improvement on average dollar amount per order, on new and renewal orders combined, will receive a gift certificate for Houston's for dinner ($50), to use at their convenience. The contest starts on June 1 and ends on June 21. A minimum of $10 improvement is necessary to qualify.

Mid-Month Bonus Contest

The top seven employees with the highest improvement on mid-month bonus average per order will receive $35 for a Publix gift certificate. The employee with the most improvement may select a larger prize (i.e., TV, microwave, CD player). The contest starts on June 1 and ends on June

21. A minimum of $10 improvement is necessary to qualify.

Outbound

The ten most improved employees on outbound sales will receive $100 Publix gift certificates. The improvement has to be in the average dollar amount sold and the number of sales. Contest starts on June 1 and ends on June 30. You must have an improvement of 5% in the number of sales and an average order of $80 to qualify for the contest.

The improvement will be based on a comparison to May's sales figures.

DW:pmp

APPENDIX F

In the Sun-Sentinel newspaper of Sunday, July 19, 1992, there is a partial listing of 35 advertisements for work in telemarketing. Offered pay range from "$1000 - $2000 weekly" to $7. an hour, the figure most commonly quoted.

Unfortunately[1] for America, the country was then entering the age of telemarketing.

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[1] A redeeming feature of the defendant's sales efforts was its policy of no "cold calls". First contact was initiated by the prospect.

APPENDIX G

To guide a telephone conversation in a way most profitable to the defendant, a detailed Worksheet was used. It was created by Andrea Ciba, founder and director of the department, and it was used at every position. It served both as a guide and report for every single call.

Towards the bottom of this 14" sheet there are two headline words, all in caps. And they are the only words given such prominence. The words are "BUILD RAPPORT", followed underneath in smaller type: "Chat about the weather, investment needs, etc."

The emphasis on rapport was also noted at the weekly sales meetings and in the sales manual ("No one likes a pushy salesperson . . .")

Also, in view of defendant's constant urging to increase sales by "boosting" and "cross-selling", to first establish rapport would seem a likely basis.

But what happened to all such reasoning when defense tactics took over? It is amazing. (Next page.)

From the Ciba Affidavit of December, 1995 (she had resigned June 1, '92): "I told Mr. Walker to 'get 'em on the phone, sell 'em, and get 'em off the phone.'" Her sworn statement, with many clear examples of perjured testimony, helped steer the District Court to statements like this in its Summary Judgement: "Both Ciba and Winfield[1] testified that they advised Walker that establishing rapport contravened the Institute's policies. (Winfield Dep.29. 31-33. Ciba Aff. 15)"

ALL OF THE ABOVE WAS MADE CLEAR TO BOTH COURTS. THEY SIMPLY LOOKED THE OTHER WAY.

[1] Former supervisor. Replaced Ciba.

Apparently based on mass information from the District Court — despite my nine pages protesting undisputable distortions of truth — the Appeals Court accepted wholesale every lie and misrepresentation. Examples:

> ". . . failed to comply with the required sales' techniques and operating procedures". (App. A, page 24)
>
> ". . . does not dispute he was unable to spend 50 minutes per hour on the phone." Malicious and false.
>
> ". . . failed to establish a nexus . . . on basis of age", — though defendant's own records show that I exceeded average age of males by 49 years.

Adverse decisions by such a high Court, so readily accepting false arguments rather than true ones, is a very tough experience.